LIM KEK PING & ANOR

v.

THAI WAH CONSTRUCTION & DEVELOPMENT SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[SUIT NO: 22-1-2006-I(SG)]
23 MAY 2006

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Allegation of trespass and nuisance - Injunction sought to order first defendant to remove and clear concrete slab, iron bars and piles erected on plaintiffs' land - Whether constituted serious violation of plaintiffs' proprietary rights as landowners - Whether removal of could damage plaintiffs' land - Exposing first defendant to financial losses - Whether a poor reason for refusal of relief - Public interest - Argument of - Whether there was element of public interest involved - Whether damages an adequate remedy for plaintiffs - Justice of the case - Whether lies in favour of the grant of injunctions sought*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Allegation of trespass and nuisance - Injunction sought to order first respondent to remove, clear and prevent further discharging of water and waste - Whether water and mud flowed from housing project onto plaintiffs' land - Whether temporary drainage insufficient to prevent flooding of plaintiffs' land - Whether plaintiffs' own failure to provide a proper drainage system caused the flooding - Exposure of plaintiffs' health to risk - Justice of the case - Whether lies in favour of the grant of injunctions sought*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Allegation of trespass and nuisance - Injunction sought to order first defendant to construct a permanent outlet to allow excess water to flow out of plaintiffs' land - Allegation of hardship and difficulty faced by first defendant - Whether should prevent grant of relief - Justice of the case - Whether lies in favour of the grant of injunctions sought*

The first and second plaintiffs were co-proprietors of a parcel of land ('the plaintiffs' land). The rear portions of the plaintiffs' land share a common boundary with three other parcels of land namely, Lot 99, Lot 190 and Lot 698 Block 4 Undup Land District. These three parcels of land together with six other parcels

of land, namely Lot 341, Lot 352, Lot 690, Lot 770, Lot 771 and Lot 772 Block 4 Undup Land District were all being developed by Thai Wah Construction & Development Sdn Bhd ('the first defendant') into a housing and commercial estate known as Taman Desar Indah ('the housing project'). The second defendant was the registered proprietor of Lot 99, while the third and fourth defendants were co-proprietors of Lot 689 and directors of the first defendant company. The plaintiffs and the defendants have come into dispute because, according to the plaintiffs, the defendants have caused the flatter areas at the rear of their land to become flooded and water-locked by the first defendant having raised the level of the housing project lands to some 1.5 meters above the level of the plaintiffs' land and building a retaining wall along the southern boundary of the plaintiffs' land. The plaintiffs also said that the first defendant had committed a trespass on their land by wrongfully constructing a huge concrete slab on it. Fearing that further flooding would be caused to their land, the plaintiffs commenced this action for trespass and nuisance against the defendants and applied for the following interlocutory injunctions against the first defendant: (1) an order that the first defendant completely remove and clear so much of the concrete slab and iron bars as erected on the plaintiffs' land and to fill up and level the plaintiffs' land to its original state and compact it immediately upon removing the mixed hardwood or bakau piles and the said concrete slab; (2) that the first defendant completely remove and clear so much of the mixed hardwood or bakau piles as are driven into the plaintiffs' land and to fill up and level the plaintiffs' land to its original state and compact it immediately upon removing the mixed hardwood or bakau piles; (3) that the first defendant pump out, completely remove and clear so much of the water, waste mud and/or slush which has flowed from the housing project onto the plaintiffs' land; (4) that the first defendant prevent and/or stop further discharging and/or draining water, waste and/or refuse from the housing project onto the plaintiffs' land; (5) an order requiring the first defendant to construct a permanent outlet to allow excess water to flow out of the plaintiffs' land in place of the natural passage for water which the first defendant had obstructed.

The first defendant, however, opposed each of the orders sought by the plaintiffs on the following grounds: (i) that the delay of the plaintiffs in complaining about the trespass would defeat their right to the injunctions sought; (ii) that if the first defendant were to be ordered to remove the concrete slab and piles, it would be put

to hardship and expense, would cause damage to the plaintiffs' land, would cause danger and its manpower and resources would be diverted, thereby leading to a delay in the completion of the housing project which would expose it to huge financial losses; (iii) it was in the public interest not to destabilize the retaining wall and so the first and second injunctions sought by the plaintiff should be refused; (iv) the first defendant denied that water and mud had flowed from the housing project onto the plaintiffs' land thus the third and fourth injunctions should not be granted; (v) that the plaintiffs were using their land 'illegally' in that the condition endorsed on their title stated that the land was for agriculture purposes only but the plaintiffs have built a double storey detached dwelling cum warehouse on the land and so was using their land for residential, commercial and agricultural purposes; (vi) that the flooding on the plaintiffs' land was caused by the plaintiffs' own failure to provide a proper drainage system to cater for the water from their house to be trapped on their land; (vii) that the grant of the fourth injunction would not produce a fair result as nuisance had not been established by the plaintiffs; (viii) it would be manifestly unjust to grant the fifth injunction because it would cause difficulty and hardship to the first defendant at this stage to amend and reapply for approval of the engineering plan to provide the outlet the plaintiffs required.

Held (granting injunctions sought):

(1) This court did not find that the plaintiffs have slept on their rights as alleged by the first defendant. The first defendant began piling works for the retaining wall in about mid July 2004. The evidence showed that immediately on observing the piling works going on on their land, the first plaintiff lodged a police report on 12 July 2004 about the trespass. Thereafter he made enquiries from a surveyor of the first defendant who also worked at Lands & Surveys Department at Betong and had also gone to check personally with the Lands & Surveys Department at Sri Aman. The plaintiffs had also engaged a professional private surveyor to conduct a boundary survey of their land which confirmed the trespass. As far as the allegation of nuisance was concerned, the first plaintiff immediately went to the Lands & Surveys Department to complain about water and mud from the housing project flowing onto their land. The action taken by

A the first plaintiff was reasonable steps which any other similarly circumstanced landowner would take before going to court for relief. There was no delay on the part of the plaintiffs in seeking relief. (paras 50, 51 & 52)

B **(2)** The concrete slab and piles which by the first defendant's own admission sat on the plaintiffs' land constituted a serious violation of the proprietary rights of the plaintiffs as landowners. It adversely affected the enjoyment of their land. It does not sit well with a just result between now and the C trial, that the first defendant, whose sole purpose in developing the housing project was to sell the houses and shophouses constructed thereon for sale to third parties to generate a profit for itself should be heard to say that the plaintiffs should be left to its remedy in damages at the trial, D if trespass was established. Here, the trespass was not one of a temporary nature or of a limited duration. The trespass was a continuing one which had not abated. Accordingly, damages would not be an adequate remedy to the plaintiffs. (paras 53)

E **(3)** The defendant's argument that removing the concrete slab and piles could do damage to the plaintiffs' land was unacceptable. When the first defendant had put the piles onto the plaintiffs' land and built the concrete slab, it did so F without disturbing the chain link fence of the fish ponds. The plaintiffs should not be denied, nor the court be deterred from arriving at a just result by the first defendant's veiled threat to become destructive if ordered to carry out the works. Further, the first defendant's submission that the G removal of the concrete slabs and piles would be dangerous was a self serving and perverse argument. The first defendant, who admitted to having wrongly piled and built the concrete slab on the plaintiffs' land now turned around to say, in effect, that the court should sanction the H continuance of an acknowledged trespass and gross violation of the plaintiffs' proprietary rights just to benefit the first defendant. This court accordingly rejected this argument. (paras 54 & 55)

(4) The first defendant's contention that ordering the concrete I slab to be removed would expose it to huge financial losses was a poor reason for the refusal of relief to the plaintiffs. The first defendant's argument showed that it placed the

making of a monetary profit for itself above all else, despite the fact that the trespass to the plaintiffs' land was serious and continuing. If the first defendant was exposed to claim of liquidated damages, it only had itself to blame for such exposure. The first defendant had also not placed any material before the court to enable the court to exercise discretion in its favour on this point. (para 56)

(5) With regard to the 'public interest' argument relied on by the first defendant to oppose the grant of relief to the plaintiffs, this argument was misconceived. There was no element of public interest involved in this case. The first defendant was not performing any public functions or duties in developing its own private lands into a housing project. It was only the very narrow commercial interest of the first defendant that was affected by any order the court may make here. (para 57)

(6) This court did not agree with the first defendant's submission that the third and fourth injunctions sought by the plaintiff should not be granted. The first defendant denied that water and mud had flowed from the housing project. Although the first defendant had said that the drainage system for the rest of the housing project was completed, by its own admission its drainage system at those parts of the housing project that border the plaintiffs' land was still temporary drainage. The fact that mud and water accumulated in such large amounts on the plaintiffs' land showed that the temporary drainage was insufficient to prevent the flooding to the plaintiffs' land. The truth of the matter was revealed in photos exhibited by the plaintiffs which showed that the temporary culvert which was installed by the first defendant was almost chocked and three-quarters buried in mud while water and mud was able to flow onto the plaintiffs' land at the uncompleted end of the first defendant's retaining wall. (para 59)

(7) With regard to the first defendant's allegation that the plaintiffs were using their land 'illegally' because they have 'developed' it, whether or not the plaintiff have done what the first defendant alleged on their land or whether the plaintiffs have breached any provisions of s. 230 of the Sarawak Land Code ('the Code') were not matters which

were suitable to be decided at this interlocutory stage. They gave rise to issues which could only be decided at the trial. Further, even if the plaintiffs have breached some provisions of the Code, that could not possibly be a justification for the first defendant to cause flooding to the plaintiffs' land. (para 60)

(8) This court did not agree with the first defendant's contention that it was the plaintiffs' own failure to provide a proper drainage system that caused the flooding. The evidence produced by the plaintiffs showed that they have built a drain around their house cum warehouse to drain away water from the house. Accordingly, the bulk of the flood water and mud which the plaintiffs sought relief from through the third and fourth orders came from the housing project. Rain water which has flowed naturally down the slope at the rear of the plaintiffs' land has now become trapped on the plaintiffs' land but that has resulted from the first defendant raising the level of its land and building its retaining wall and not because of the plaintiff not having a proper drainage system as alleged. (para 61)

(9) With regard to the first defendant's complaint that if the injunctions sought by the plaintiffs were granted, it would amount to saying that the first defendant had committed nuisance without affording it a right to be heard in a fair and full trial, there was nothing in the point taken. The effect of the court granting to the plaintiffs the injunctions they sought was that this would virtually give to them, at this stage of the proceeding, the relief they sought in the action, but this does not preclude the court from granting an order. (para 63)

(10) It was the plaintiffs' stand that the third and fourth orders should be granted to them as the trapped flood waters have begun to stagnate and emit a foul smell. This court agreed with the plaintiffs that they have cause to be concerned with this unhealthy state of affairs. Until the trial of this action, it was not right to expose the plaintiffs' health to risk in the meantime. (para 64)

(11) The grant of the fifth order may necessitate the first defendant having to amend and re-apply for approval of its drainage/engineering plan but this court did not see why that should prevent the grant of relief. After all, the first

defendant had no difficulty amending its plans when it wanted to put up its retaining wall. The present hardship and difficulty being faced by the plaintiffs from water being trapped on their land far outweighed the difficulty of the first defendant having to amend its plans and re-submit them for approval. (para 67)

(12) The plaintiffs were not here trying to enforce any of the statutory rights mentioned in s. 35(4) of the Code. The plaintiffs came to court to enforce their common law rights of drainage as an incident of property arising between owners of adjoining lands because of the relative levels of their respective lands. Accordingly, this court found the arguments based on ss. 35(4), (7) and (8) of the Code irrelevant. (para 71)

(13) Justice of the case lies in favour of the grant of the injunctions sought. Far greater harm would result from the withholding of injunctive relief than by its grant. Accordingly, this court granted the plaintiffs' application for the first, second, third and fourth orders in the terms prayed for. In respect of the fifth injunction, this court granted an order in the following terms : that the first defendant do all things that may be necessary including but not limited to lowering invert levels of the drains in the housing project and making such amendments to the first defendant's engineering plans/ drainage plans as may be necessary and applying for approval for the same to the relevant authorities so as to provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land into the housing project's drainage system through the same passage and/or channel in Lot 698 as where the first defendant's temporary culvert was situated or any other passage or channel that would achieve the purpose. (paras 72 & 73)

Case(s) referred to:

Bailey v. Vile & Anor [1930] NZLR 829 ***(refd)***

Chan Jen Chiat v. Allied Granite Marble Industries Sdn Bhd [1994] 3 MLJ 495 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 ***(refd)***

ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA ***(refd)***

A *Films Rover International Ltd & Ors v. Cannon Film Sales Ltd [1986] 3 All ER 772* ***(refd)***
Gartner v. Kidman [1961-1962] 108 CLR ***(refd)***
Gibb & Co v. Malaysian Building Society Bhd [1982] CLJ 185; [1982] CLJ (Rep) 99 FC ***(refd)***
B *Gibbons v. Lenfestry 84 LJPC 158* ***(refd)***
Home Brewery plc v. William Davis & Co (Loughborough) Ltd [1987] 1 All ER ***(refd)***
John Young & Co v. Bankier Distillery Co [1983] AC 169 ***(refd)***
Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234 ***(refd)***
C *Medway Investments Pte Ltd v. Trustees of the Estate of Cheong Eak Chong [1997] 3 SLR 40* ***(refd)***
Scott Rural Municipality v. Edwards [1934] 3 DLR 793 ***(refd)***
Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysian Industries Sdn Bhd [1984] 1 CLJ 291; [1984] 1 CLJ (Rep) 326 FC ***(refd)***
D *Sheik Hussain Sahib v. Pachipulusu Subbayya [1925] ILR 49 Mad 441* ***(refd)***
Tay Than Kiat & Anor v. Pritam Singh Brar [1987] 1 MLJ 276 ***(refd)***
Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 CA ***(refd)***
Toyo Textiles Industries Sdn Bhd & Anor v. Lian Foong Housing Development
E *Sdn Bhd [1986] 1 MLJ 412* ***(refd)***

Legislation referred to:
Land Code (Cap 81) (Sarawak), ss. 35(4), (7), (8), 227, 230, 232(2)
Specific Relief Act 1950, s. 54(g)

F *For the plaintiffs - Yong Sie Mee; M/s Loke King Goh & Partners*
For the 1st defendant - Chen Chieng Ning (Azizi Morni with him); M/s Chen Chieng Ning & Azizi

Reported by Suhainah Wahiduddin

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JUDGMENT

Clement Skinner J:

H **[1]** This is the hearing of an application by the plaintiffs for various injunctions against the defendants. I will describe the orders that are sought after setting out the facts leading to the application for relief.

I **[2]** The 1st and 2nd plaintiffs are husband and wife. They are the co-proprietors of a parcel of land, namely, Lot 700 Block 4 Undup Land District (hereafter 'the plaintiffs' land'). It measures

some 6030 sq. meters or 1.49 acres approximately. An endorsement on the title to the plaintiffs' land states that it is to be used only for agricultural purposes. The plaintiffs have built a dwelling house on their land. The defendants describe it as a house cum 'warehouse'. It is a point to which I will return shortly. The plaintiffs have planted up their land with fruit trees, flowering plants and have also constructed 3 fish ponds in which they rear tilapia fish. The produce from the plaintiffs' efforts at agriculture are for their own consumption as well as for commercial purposes.

[3] The plaintiffs' land is more or less rectangular in shape. The front portion of the land which is north facing consists of a hill which slopes down to a flatter area at the back which faces south. Rain water from the front portions of the plaintiffs' land, where their house is built, flows into a Jabatan Kerja Raya ('JKR') public drain running along Long Round Road, while rain water from the rear portions of the plaintiffs' land flows naturally down the slope to the flatter areas of the plaintiffs' land and then in undefined channels onto neighbouring lands owned by the defendants. The plaintiffs' fish ponds are located in the flatter areas. A chain link fence surrounds the plaintiffs' land.

[4] The rear portions of the plaintiffs' land share a common boundary with 3 other parcels of land namely, Lot 99, Lot 190 and Lot 698 Block 4 Undup Land District. These 3 parcels of land together with 6 other parcels of land, namely, Lot 341, Lot 352, Lot 690, Lot 770, Lot 771 and Lot 772 Block 4 Undup Land District are all being developed by Thai Wah Construction & Development Sdn Bhd ('the 1st defendant') into a housing and commercial estate known as Taman Desa Indah (hereafter 'the housing project'). The 1st defendant has obtained planning approval from the State Planning Authority to subdivide the above mentioned 9 parcels of land and construct on them 317 units of shops and houses of various types. For completeness, it should be mentioned that the 2nd defendant is the registered proprietor of Lot 99, while the 3rd and 4th defendants are the co-proprietors of Lot 689. The 3rd and 4th defendants are also directors of the 1st defendant company. For convenience I will, where necessary, also refer to the lands which make up the housing project, by their individual lot numbers.

[5] The plaintiffs and the defendants have come into dispute because the plaintiffs say the defendants have caused the flatter areas at the rear of their land to become flooded and water-locked by the 1st defendant having raised the level of the housing project lands to some 1.5 meters above the level of the plaintiffs' land and building a retaining wall along the southern boundary of the plaintiffs' land. Prior to the completion of the retaining wall, the plaintiffs say that water and mud from the raised portions of the housing project flowed onto the flatter southern portions of their land causing it to flood. After the retaining wall was completed, rain water falling on the rear portions of the plaintiffs' land has become trapped on the flatter portions of the plaintiffs' land causing it to be flooded. The plaintiffs also say the 1st defendant has committed a trespass on their land by wrongfully constructing a huge concrete slab on it.

[6] The defendants deny these allegations. The 1st defendant says that it has 'always been sensitive to the interests of the adjoining landowners' in all the development projects it has previously undertaken.

[7] It is not disputed that to enable the 9 parcels of land comprising the housing project to be built on, the 1st defendant undertook land clearing, filling and earth levelling works. In particular the 1st defendant undertook earth levelling and filling works along the south-eastern and south-western boundary of the plaintiffs' land between boundary pegs 354 to 357 and 357 to 358, with the result that Lot 99, Lot 190 and Lot 698 became some 1.5 meters higher than the southern or bottom parts of the plaintiffs' land along the boundary pegs just mentioned. Initially the 1st defendant did not construct any retaining structure to retain the earth that had been filled on Lots 99, 190 and 698. The 1st defendant has explained why and I shall deal with it shortly.

[8] With regard to the earth filling and levelling activities on the housing project site, the plaintiffs alleged that by June 2004 water and mud from the housing project began flowing onto their land. So the 1st plaintiff went to complain about it to the Lands and Survey Department in Sri Aman but was advised to address his complaint to Lembaga Sumber Asli Dan Alam Sekitar Sarawak (hereafter 'the Department of Environment'). According to the 1st plaintiff, before he wrote to the department, he went to see the 3rd defendant Mr. Tay Ah Tee at the 1st defendant's construction site to try to get the latter to stop the flow of water

and mud onto the plaintiffs' land, but says that he was given such a telling off by Mr Tay that he quickly left the construction site, after which the plaintiffs say they have not spoken to him since. The 3rd defendant Mr. Tay Ah Tee totally denies that the 1st plaintiff came to see him to complain about the flooding or that he gave the 1st plaintiff a telling off as alleged.

[9] On 28 June 2004 the 1st plaintiff wrote to the Department of Environment to complain about the flooding on their land. Following the complaint, officers of the department visited the housing project site, following which the 1st plaintiff says he was informed by Mr. Jefrin Johnny of the Department of Environment that the 1st defendant had been asked 'to construct a drain'. However, the 1st defendant says that until today it has not heard any adverse comments from the department.

[10] The 1st defendant explained why it did not initially build a retaining wall to retain the earth at those parts of Lots 99, 190 and 698 which had been raised, in paras. 17, 18, 19 and 20 of Mr. Tay Ah Tee's affidavit affirmed on 11 February 2006. Mr. Tay stated that during the course of the 1st defendant's earth filling and levelling works on Lot 99, his engineers informed him that since Lots 99 and 698 were going to be earth filled up to approximately 1.5 meters higher than the lowest part of the plaintiffs' land as indicated in the approved engineering plans for the housing project, this would necessitate building a retaining wall right at the boundary of the plaintiffs' land along boundary pegs 354, 357 and 358. However, according to Mr. Tay, this retaining wall ought to have been constructed by the plaintiffs because the natural topography of their land was such that rain water would flow from the higher part of the plaintiffs' land to Lots 99, 190 and 698 which are naturally lower lying than the plaintiffs' land. Mr. Tay went on to state that he was fully aware that by building a retaining wall, (and here I quote him): 'the plaintiffs' land would be totally 'water-locked' as [their] water from the higher part of [their] land would flow down and be trapped by the retaining wall'. Therefore, according to Mr. Tay, in the spirit of neighbourliness he met the 1st plaintiff and offered to fill the plaintiffs' land to the same level as Lots 99 and 698 and to share the drainage system which was to serve the housing project. According to Mr. Tay, such an offer would save the plaintiffs the costs of constructing their own drainage and the retaining wall and at the same time, saving the 1st defendant time and additional expenses in applying for amendment of its engineering plan to

construct the retaining wall and claim from the plaintiffs subsequently. However, according to Mr. Tay, the 1st plaintiff sarcastically spurned his offer.

[11] The 1st plaintiff denies that Mr. Tay Ah Tee made any such offer to the plaintiffs.

[12] According to Mr. Tay, when the plaintiffs refused his offer, he realised that construction of a retaining wall would be necessary 'under standard engineering practice'. Mr. Tay asserted that since water from the plaintiffs' land continued to flow onto the 1st defendant's land and knowing that the construction of a retaining wall would eventually block the plaintiffs' water from entering the housing project's temporary drainage system, he wrote a letter dated 26 July 2004 to the plaintiffs to remind them of the need to have their own drainage system as the 1st defendant was not obliged and could not make available the housing project's temporary drainage system forever. I pause here to note that when the 1st defendant's letter of 26 July 2004 (exh. TCH11) is read, it was to complain to the plaintiffs that water from the rear part of the plaintiffs' land 'encroaches onto Taman Desa Indah, resulting in considerable inconvenience to us, erosion of and damage to our soil, thereby distorting the progress of our works'. According to the 1st defendant's letter, 'the foregoing stems from the absence of a drainage discharge system at the rear portion of your land'. The plaintiffs were accordingly requested to 'take necessary measures to prevent the problem from persisting'.

[13] The plaintiffs say they received the 1st defendant's letter of 26.7.2004 about one month after they complained to the Department of Environment about the 1st defendant. The plaintiffs say they did not reply to the 1st defendant's letter of 26 July 2004 because they considered its contents to be unreasonable, considering the fact that by middle of 2004 the level of their land was already lower than that of the housing project and so it was not possible for their water to flow onto the housing project.

[14] It would appear that even before the 1st defendant had written its letter of 26 July 2004 to the plaintiffs, the 1st defendant began to take steps to construct the retaining wall, because according to Mr. Tay Ah Tee's affidavit of 7 March 2006, sometime in or about middle of July 2004 the 1st defendant began piling works for the retaining wall along the entire south-eastern boundary of the plaintiffs' land, between boundary pegs 354 and 357. The 1st defendant drove some 60 hardwood or

bakau piles measuring some 8-12 inches in diameter and 16-20 feet long into the ground. Thereafter the 1st defendant built a concrete slab measuring some 200 feet long and 5 feet wide over the entire portion of the area that had been piled. This concrete slab was to serve as the foundation for a retaining wall that was to be constructed along the entire length of the south-eastern boundary of the plaintiffs' land. According to the 1st defendant the concrete slab was completed by November 2004. Very noticeably the 1st defendant has not produced any approvals from any authority for the construction of this concrete slab on which a retaining wall was to be constructed.

[15] Sometime in March or April 2005 when the 1st defendant was ready to build the retaining wall on the concrete slab, the 3rd defendant was alerted, by the events described below, to the fact that the concrete slab may have been built on the plaintiffs' land, so the 1st defendant's surveyors were accordingly instructed to check. On being informed of its 'surveyor's findings', the 1st defendant simply left the concrete slab and piles where they lay and moved back into its own land ie, Lot 99 where it then began to construct a retaining wall between boundary pegs 354 and 357 along the south-eastern boundary of the plaintiffs' land. By May 2005 part of the retaining wall between boundary pegs 354 to 175 had been completed.

[16] The 1st defendant gave the following explanation for building the concrete slab where it did. Mr. Tay Ah Tee, the 3rd defendant explained that before the piling works for the concrete slab began, he and the 1st defendant's project manager visited the boundary between Lot 99 and the plaintiffs' land. The 3rd defendant apparently noticed 2 wooden pegs placed next to the chain link fence which ran along the south-eastern boundary of the plaintiffs' land. Thinking that these 2 wooden pegs indicated the boundary of Lot 99, the 1st defendant went ahead with the works to construct the concrete slab along the length of the plaintiffs' chain link fence, but a few feet away from it. The 3rd defendant further explained that when the concrete slab was completed and the retaining wall was about to be constructed on the concrete slab, it had to be properly aligned to run parallel to the boundary of the plaintiffs' land. It was then noticed that the 2 wooden pegs which the 3rd defendant had earlier seen were missing. On the 1st defendant's surveyor being instructed to refix the 2 wooden pegs, the 1st defendant was alerted to the encroachment on the plaintiffs' land.

[17] The plaintiffs noticed the works going on along the chain link fence on their south-eastern boundary. The 1st plaintiff said that on 12 July 2004 he lodged a police report against the 1st defendant for trespass. He also called a Mr. Yong Ah Mui, a surveyor for the 1st defendant and who was also working with the Lands and Surveys Department in Betong, Sarawak to inform him about the encroachment but according to the 1st plaintiff, Mr. Yong assured him that the 1st defendant was not encroaching onto his land. The 1st plaintiff then went to check with the Lands and Surveys Department in Sri Aman, Sarawak but did not get much information from them. In April or May 2005, the plaintiffs engaged a private surveyor to conduct a boundary survey of their land. The plaintiffs' professional private surveyor has presented a site report 'exh. LKP7' dated 2 May 2005. It confirms that (and I quote): 'a concrete slab of approximately 26.5 meters by 1.1 meters was found to be inside Lot 700. Another 5.5 meters of the slab which was on the northern end had been partially demolished at the time of survey. There is another portion of the slab on the southern end that is not visible. This segment is covered by mud during the time of survey. By probing with steel rod, we estimate that the slab could extend another 25 meters in the south westerly direction'.

[18] The plaintiffs assert that before the 1st defendant raised the level of Lots 99, 190 and 698 and built the retaining wall, surface water from the back portion of their land could naturally flow to Lots 99, 190 and 698 but this natural flow of water has been obstructed or blocked. The filling and raising of the level of these lots has also caused water and mud to flow from the housing project to the southern parts of the plaintiffs' land.

[19] Between December 2005 and January/February 2006, the plaintiffs say that with the onset of the Sarawak 'Landas' or monsoon season, some heavy rains were experienced at Sri Aman, Sarawak, which resulted in severe flooding to the southern parts of their land, caused by water, waste and mud flowing onto their land from the 1st defendant's housing project. As a result of this flooding some 2,000 sq. meters of the southern portion of the plaintiffs' land come under some 1.5 to 2 meters of water. The plaintiffs' three fish ponds have totally disappeared in the floods while the fish in the ponds have disappeared. According to the plaintiffs the flood waters on the affected parts of their land became stagnant and began emitting a foul smell as there was no

outlet for the trapped water. The plaintiffs fear the trapped water will give rise to health problems too. The plaintiffs also complain that the flooding caused their fruit trees and flowering plants to die.

[20] In respect of that stretch of retaining wall already built by the 1st defendant on Lot 99, the plaintiffs have raised two complaints about it. Firstly, on 13 February 2006 the plaintiffs instructed their surveyor to carry out a check to ascertain if the retaining wall encroaches onto their land. The plaintiffs' surveyor has submitted a report (exh. LPK17) dated 15 February 2006 which shows that a small section (about 5 meters in length) of the bottom portion of the retaining wall encroaches onto the plaintiffs' land by some 29 mm, but that the top of the entire retaining well is well within Lot 99. Secondly, the retaining wall was constructed without a drain at the bottom of the wall. This has resulted in water from the housing project discharging onto the plaintiffs' land through the weep-holes and numerous small cracks and holes along the entire length of the retaining wall.

[21] Fearing that further flooding will be caused to their land in view of the continuing landas season the plaintiffs commenced this action for trespass and nuisance against the defendants on 6 February 2006. On the same day the plaintiffs applied for the following interlocutory injunctions against the 1st defendant:

(1) An order that the 1st defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within fourteen (14) days of the date of this order pull down, completely remove and clear so much of the concrete slab and iron bars as are erected on the plaintiffs' land and to fill up and level the plaintiffs' land to its original state with red soil and compact it immediately upon removing the mixed hardwood or bakau piles and the said concrete slab;

(2) An order that the 1st defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within fourteen (14) days from the date of this order dig up, completely remove and clear so much of the mixed hardwood or bakau piles as are driven into the plaintiffs' land and to fill up and level the plaintiffs' land to its original state with red soil and compact it immediately upon removing the mixed hardwood or bakau piles;

(3) An order that the 1st defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within three (3) days from the date of this order drain and or pump out, completely remove and clear so much of the water, waste mud and/or slush which has flowed from the housing project onto the plaintiffs' land;

(4) An order that the 1st defendant whether by themselves, their servants, agents or otherwise howsoever do forthwith and in any event within three (3) days from the date of this order prevent and/or stop further discharging and/or draining of water, waste and/or refuse from the housing project onto the plaintiffs' land.

[22] During the exchange of affidavits occasioned by the plaintiff's application for injunctive relief, the plaintiffs discovered, particularly from the contents of the affidavit affirmed by Tay Ah Tee on 11 February 2006 on behalf of the 1st defendant, that the 1st defendant intended to construct a retaining wall not only along the south-eastern boundary of their land along boundary pegs 354 to 357, but also along their south-western boundary between boundary pegs 357 to 358. In effect this meant that the entire bottom part of the plaintiffs' land along its south-eastern and south-western boundary would become enclosed by the 1st defendant's retaining wall, thereby permanently obstructing the water flowing out from the southern part of the plaintiffs' land. In the light of this revelation, the plaintiffs were constrained to apply for a further order requiring the 1st defendant to construct a permanent outlet to allow excess water to flow out of the plaintiffs' land in place of the natural passage for water which the 1st defendant has obstructed. In his submissions, learned counsel for the plaintiffs asked the court to make an order compelling the 1st defendant to provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land through the same passage and/or channel in Lot 698 as where the existing temporary culvert situated near boundary peg 357 now sits on such terms and conditions as the court deems fit. I will refer to this order as the fifth injunction.

[23] The 1st defendant opposes each of the orders sought by the plaintiffs on the following grounds.

[24] With regard to the first two injunctions sought by the plaintiffs, which in effect are mandatory orders requiring the 1st defendant to remove the concrete slab and piles from the plaintiffs' land, the 1st defendant initially totally denied that it caused any encroachment or trespass on the plaintiffs' land. Despite having abandoned the concrete slab where it lay and retreated to Lot 99 where it subsequently built its retaining wall, the 1st defendant maintains that the portion of land on which it caused wooden piles to be driven into the ground and over which it constructed the concrete slab 'may become state land or even no-man's land'.

[25] However, during the course of submissions the 1st defendant seems to have had a change of heart because in his submissions before me learned counsel for the 1st defendant stated that 'the 1st defendant does not dispute the findings of the plaintiffs' land surveyor as exhibited in exh. LPK7 that the concrete slabs constructed by the 1st defendant now sit on the plaintiffs' land'.

[26] Be that as it may, the 1st defendant says that even if liability for trespass is established against it, the court should, in the exercise of its discretion refuse to grant the plaintiffs the mandatory injunctions they seek for the following reasons: First, the plaintiffs had sat on their rights, in that, they have taken some 16 months to complain about the encroachment on their land. The 1st defendant contends that while the plaintiffs' suspicions about the trespass may have been aroused when the piling and concrete slab was being built, they must have known about the trespass for certain by May 2005 after receiving their surveyor's report on the matter but it took them another nine months before they brought this action. Accordingly it is the 1st defendant's case that the delay of the plaintiffs in complaining about the trespass would defeat their right to the injunctions sought.

[27] Secondly, the 1st defendant says that the trespass on the plaintiffs' land was not intentional in that the 1st defendant honestly believed that it had piled and constructed the concrete slab on its own Lot 99 or at most on state land or even on 'no-man's' land.

[28] Thirdly, the 1st defendant says that ordering the demolition of the concrete slab and extraction of the piles would not produce a just result at this stage of the case because the grant of the 1st and 2nd orders sought by the plaintiffs would not serve any useful purpose or be of benefit to the plaintiffs since they have neither

occupied that area of land where the piles and concrete slab are nor do the piles and concrete slab cause the flooding on the plaintiffs' land. On the other hand, ordering their demolition and extraction would cause great hardship and expense to the 1st defendant, in that, the 1st defendant would need to deploy one or two excavators to undertake such works. The 1st defendant also says that such demolition works could cause damage to the plaintiffs' land because, according to the 1st defendant, 'to enable the excavators to move in, the chain link fence of the plaintiff would have to be demolished and certain part of the plaintiffs' so called fish ponds will be earth-filled as well (quite apart from placing timber log sleepers over the land due to soft ground conditions and water logged areas), in order for the excavator to have a firm working platform'. It was submitted on behalf of the 1st defendant that since the plaintiffs had acquiesced to the construction of the concrete slab, the mandatory injunction, if granted, would not produce a fair result because, to use the words of Thean J, in the Singapore case of *Tay Than Kiat & Anor v. Pritam Singh Brar* [1987] 1 MLJ 276, on which the 1st defendant relies, 'the obligation imposed on the defendant is extremely onerous and is out of all proportion to the benefit to be gained by the plaintiffs'. Accordingly the 1st defendant says that the plaintiffs can be adequately compensated by an award of damages if trespass is established at trial and damage is proved.

[29] Fourthly, according to the 1st defendant, the concrete slab and piles actually serve to retain the soil and prevent underground soil movement. The 1st defendant says that since it has built its existing 1.5 meter high retaining wall some 6-8 feet away from the concrete slab that runs along the boundary of Lot 99, the demolition of the concrete slab and extraction of the piles would cause its retaining wall to be unstable, even to the extent of collapse. If that were to happen then soil erosion may occur resulting in the collapse of the upper drainage system serving the housing project, resulting in disastrous consequences to the plaintiffs' land, in that, water and waste from the housing project would discharge onto the plaintiffs' land. But that is not all, the 1st defendant says that the foundations of the detached houses it has built along the retaining wall will also start to crack or even collapse. Counsel for the 1st defendant even went on to submit that 'the foundation of the houses and consequently the livelihood and safety of the 317 house owners would be compromised'.

[30] Fifthly, the 1st defendant contended that if the orders sought by the plaintiffs are granted, much of its manpower and resources would have to be diverted towards the remedial works ordered with the result that the housing project which consists of 317 units of residential houses and shops would be seriously disrupted leading to delay in their completion which is scheduled this April. According to the 1st defendant any delay in allowing the purchasers to move into their houses would financially burden them as they are mostly civil servants and people of lower/middle income who currently rent houses elsewhere. Further, any delay in completion would also expose the 1st defendant to huge financial losses in terms of having to pay liquidated damages to the purchasers for late completion. Accordingly it was the 1st defendant's case that it was in the public interest not to destabilise the retaining wall on Lot 99, and so the first and second injunctions sought by the plaintiffs should be refused. In support the case of *Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695 (CA) was cited.

[31] It was lastly said that the plaintiffs had tried to mislead the Court into granting an *ex parte* injunction to them on the basis of the danger posed by the concrete slab, in that, the plaintiffs had exhibited photos taken when the concrete slab was being constructed in 2004, which photos show iron bars protruding upwards from the concrete slab which have been left exposed. According to the 1st defendant all the protruding iron bars had been shaved off by the time these injunctions were applied for.

[32] With regard to the third and fourth injunctions sought by the plaintiffs, which in effect requires the 1st defendant to pump out or remove or clear the flood waters and mud that has accumulated on the plaintiffs' land and thereafter to prevent the same from recurring, the 1st defendant contends that these injunctions should be refused by the court for the following reasons. First, the 1st defendant denies that water and mud from the housing project has flowed onto the plaintiffs' land as alleged. According to the 1st defendant it is not possible that the flooding and mud found on the plaintiffs' land came from the housing project because there is an approved engineering plan for the housing project. This engineering plan includes a drainage system for the whole housing project which has been completed substantially. It is only those parts of the drainage system which borders the plaintiffs' land that remains as temporary drainage. Nevertheless, according to the 1st defendant, the temporary

drainage system it has in place and which it has maintained throughout the development of the housing project even up to the present time, is sufficient to channel or divert water away from the plaintiffs' land. The 1st defendant also points out that a temporary culvert it has constructed near boundary peg 357 sits at a level of 10.28 meters which is lower than the lowest part of the plaintiffs' land. Therefore, according to the 1st defendant, it is not possible for water to be discharging through that culvert onto the plaintiffs' land as alleged. Instead, the 1st defendant says it is this culvert that is helping to drain away the plaintiffs' water.

[33] Secondly, the plaintiffs are using their land illegally, in that, the condition endorsed on their title states that the land is for agriculture purposes only, but the plaintiffs have built a double-storey detached dwelling cum warehouse on the land and so are using their land for residential, commercial and agricultural purposes. In so doing, the 1st defendant contends that the plaintiffs had 'developed' their land. But to develop their land, the 1st defendant says that the plaintiffs must first apply for and obtain approval for variation of title conditions under the relevant provisions of the Sarawak Land Code ('the Code'). In support counsel for the 1st defendant referred to s. 227 of the Code which defines 'development' as, amongst others, the making of any material change in the use of any building or land. The section also states that 'the use for other purposes of a building or part of a building originally constructed as a dwelling-house' shall constitute material change of use or development of land. And when an application is made to develop land, s. 232(2) of the Code states that where the State Planning Authority decides to approve the sub-division or development of the land, it may impose conditions or requirements to make provisions for construction of, amongst other things, sewers and drains. Accordingly, it is the 1st defendant's case that if the plaintiffs had applied for approval to 'develop' their land, they would have had to undertake and complete engineering works, including drainage works, as one of the conditions for approval. The 1st defendant says that since the plaintiffs had not applied for variation of title conditions, they are using their land illegally. Counsel for the 1st defendant then referred to s. 230 of the Code which states that any proprietor who develops his land otherwise than in accordance with a plan of subdivision approved by the State Planning Authority shall be guilty of an offence. Accordingly it is the 1st defendant's case that the flooding on the plaintiffs' land is

not caused by water flowing from the housing project to the plaintiffs' land, but is due to the plaintiffs' own failure to maintain a proper outlet and drainage system for their water which results in the trapping of their own water on their land.

[34] Fourthly, the grant of the fourth injunction would not produce a fair result as nuisance has not been established by the plaintiffs, whereas s. 54(g) of the Specific Relief Act stipulates that an injunction cannot be granted to prevent, on the ground of nuisance, an act which it is not reasonably clear will be a nuisance. According to the 1st defendant if the injunction sought is granted at this stage it would amount to saying that the 1st defendant has committed nuisance, thereby depriving it of the right to be heard in a fair and full trial of the matter.

[35] With regard to the fifth injunction sought by the plaintiffs, which is to compel the 1st defendant to provide a permanent water outlet to allow water from the plaintiffs' land to flow to Lot 698, the 1st defendant submitted that it would be manifestly unjust to grant such an order because:

(a) the plaintiffs have failed to apply for variation of title condition before building their dwelling house cum warehouse on their land, which if they had done, the plaintiffs would have had to provide a drainage system for their own land. According to the 1st defendant, while it has had to go through all the necessary procedures to develop its lands, including obtaining the necessary approvals for its engineering plans (including drainage system), if the mandatory order sought is granted at this stage it would amount to rewarding the plaintiffs for their failure to comply with the law at the expense of the 1st defendant;

(b) it would cause insuperable difficulty and hardship to the 1st defendant at this stage to amend and reapply for approval of the engineering plan to provide the outlet the plaintiffs require. The 1st defendant maintains that based on the advise of its Consultant Engineer, the invert level (ie, the level at the bottom of a drain) of the JKR main drain at Long Round Road of 11.23 meters becomes the controlling factor in the design of the overall invert levels of the drains of the housing project. Put in another way, since the water from the housing project will mainly discharge to the JKR drain at Long Round Road, the invert level of the drains in the housing project

must not be below 11.30 m, otherwise water will not be able to flow into the JKR drain. According to the 1st defendant the level of the plaintiffs' land at the culvert at boundary peg 357 ie, the place where the plaintiffs want the court to order the 1st defendant to provide an outlet for their water, is 10.94 m whereas the invert level of the housing project's drain at that place is 12.11 m. Accordingly the 1st defendant says it is impossible for water to flow from the plaintiffs' land into the housing project's drainage system unless the plaintiffs backfill or raise the level of their land to at least 12.80 m being the road level on the housing project. According to para 16 of Kong Yew Tack's affidavit of 7 March 2006 affirmed on behalf of the 1st defendant, if the plaintiffs refuse to earth-fill the rear portion of their land and insist on the 5th order, that would necessitate the 1st defendant lowering the invert level of its drains to somewhere below invert level 10.88 – 10.94 meters. To do so, the entire engineering plan would have to be re-amended and re-submitted for approval with resultant delay and expense to the housing project. However the 1st defendant says that even if it were to lower the invert level of its drains to 10.88 – 10.94 m, it would still not solve the plaintiffs' problem because no water would flow, whether from the housing project or the plaintiffs' land, to the JKR main drain at Long Round Road because the invert level of that drain is 11.23 meters.

(c) the court has no power to make the mandatory order sought by the plaintiffs at first instance because of the provisions in ss. 35(4), (7) and (8) of the Code. Section 35(4) states that if a proprietor cannot efficiently drain his land by any existing party drain or irrigation ditch, and any neighbouring proprietors or occupiers refuse to allow him to construct suitable drains or ditches on their land, the Superintendent may order such neighbouring proprietors or occupiers to permit the construction, at the expense of the person requiring them, of such drains or ditches as may be necessary. And s. 35(7) states that any dispute between the parties concerned, in relation to this section, shall be referred to the Superintendent for his consideration and decision. Section 35 (8) goes on to state that any person aggrieved by the decision of the Superintendent under subsection (4) and (7) may within 30 days of being informed of such decision appeal to the High Court. Accordingly, it is the contention of the 1st defendant that since the above provisions of the Code have empowered

the Superintendent of Lands and Surveys to resolve disputes between neighbouring landowners in relation to drainage or irrigation, the plaintiffs here ought to complain to the Superintendent at Sri Aman first, and it is only if they are aggrieved by the Superintendent's decision that they can resort to this court by way of appeal. According to the 1st defendant this court would be usurping the functions and jurisdiction of the Superintendent of Lands and Surveys, Sri Aman if it were to grant the fifth order sought by the plaintiffs. In support the case of *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234 was cited.

[36] Having dealt with the facts and the contentions of the parties and before dealing with the law on the matter at hand, this will be a convenient place to refer to two matters which arose in the interval between the close of arguments and my reserved decision. First, the plaintiffs through their counsel requested that I inspect their land and the housing project. However, the 1st defendant responded that while it had no objection to the court doing so, the 1st defendant would not let the plaintiffs or their counsel step foot on the housing project. Since it is a basic principle of fairness that the court should not view evidence in the absence of a party to the dispute, I did not do so.

[37] Second, the plaintiffs filed an affidavit affirmed on 21 April 2006 to put before the court information they had newly obtained from the Lands & Surveys at Sri Aman in the form of a topographical survey plan 'LKP28' which was submitted by the 1st defendant together with its engineering plan for approval of the housing project. Despite the objections of the 1st defendant, I granted leave to the plaintiffs for their affidavit of 21 April 2006 to be read as I found it to be relevant to the dispute and to the application. I also allowed the 1st defendant to reply to it, which it did by its affidavit of 27 April 2006.

[38] The topographical survey plan LPK28 which was prepared by the 1st defendant's surveyor Mr. Lu Hieng Lee shows that the spot level of the plaintiffs' land is 12.500 meters along boundary pegs 354 and 357 which is different from the spot level stated in para. 9 of Tay Ah Tee's supplementary affidavit III affirmed on 7 March 2006 which states the spot level of the plaintiffs' land as between 10.98 – 11.06 meters. Further, on LPK28, the spot level

of the defendants' adjacent land is 12.550 m to 15.000 meters. This data on the topographical survey plan LPK28 gives the impression that the plaintiffs' land is lower than the defendants' land which, according to the plaintiffs, is just the opposite case. The plaintiffs say that water has in fact always flowed down from their land onto the 1st defendant's land, and not otherwise. If that was not the case the plaintiffs say it is illogical for the 1st defendant to raise the level of its land to 1.5 meters above that of the plaintiffs' or to complain about the water from the plaintiffs' land flowing onto their housing project and causing problems, or for Tay Ah Tee to state the retaining wall should have been built by the plaintiffs because the natural topography of their land was such that rain water would flow from the higher part of the plaintiffs' land to the defendants' lands which are naturally lower lying than the plaintiffs' land.

[39] According to the plaintiffs, the topographical survey plan LPK28 was submitted to assist the relevant authorities in approving the 1st defendant's engineering/drainage plans. The plaintiffs contend that if the 1st defendant had submitted a topographical survey plan showing correct levels, their land would not be submerged in water now because the relevant authorities would have detected that the plaintiffs' land had no outlet for its water and would have seen to it that the 1st defendant's drainage plan would cater for the levels on the plaintiffs' land.

[40] The 1st defendant denies that it misled the relevant authorities into approving its engineering/drainage plan by placing incorrect data before the authorities. With regard to the difference in the spot levels shown in LPK28 and para. 9 of his supplementary affidavit III of 7 March 2006, Mr. Tay Ah Tee says that since he is neither in possession of or in occupation of the plaintiffs' land, he has no knowledge and is not in a position to explain the difference in the spot levels pointed out by the plaintiffs. With that I turn to the law on the matter at hand.

[41] With regard to the principles governing the grant of interlocutory mandatory injunctions, in *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674, the Court of Appeal (per Gopal Sri Ram JCA) pointed out at p. 691 that whereas at one time it was thought that the grant of interlocutory mandatory injunctions were governed by principles different from those applicable to prohibitory injunctions, that was no longer the case as was explained in the judgment of Hoffmann J, in *Films*

Rover International Ltd and Ors v. Cannon Film Sales Ltd [1986] 3 All ER 772. His Lordship Gopal Sri Ram went on to point out (at p. 694) that the views of Hoffmann J, have been adopted and applied by the Courts in Malaysia as well as Singapore. His Lordship then went on to say at p. 694:

> It follows that the steps to be followed in an application for a mandatory injunction are the same as those in an application for prohibitory injunction. Those steps were set out in the judgment of this court in *Keet Gerald v. Mohd. Noor bin Abdullah & Ors* [1995] 1 CLJ 293 as follows: ... .

[42] In *Films Rover International Ltd v. Cannon Films Sales Ltd (supra)* Hoffmann J referred to a fundamental principal which guides the court when considering whether to grant interlocutory injunctions. He said (at p. 780):

> The principal dilemma about the grant of interlocutory injunctions whether prohibitory or mandatory, is that there is by definition a risk that the court may make a 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

[43] With that I turn to undertake an enquiry along the lines indicted in *Keet Gerald*'s case.

Are There Bona Fide Serious Issues To Be Tried?

[44] On the totality of the evidence placed before me I find that in respect of the plaintiffs' claim in trespass and nuisance the following *bona fide* triable issues have arisen. In relation to the building of the concrete slab on the plaintiffs' land, the plaintiffs have produced in evidence a boundary survey dated 2 May 2005, conducted by a professional private surveyor which clearly confirms that the concrete slab has been built within the boundary of the plaintiffs' land. During the inter-partes hearing counsel for the 1st defendant admitted that the concrete slab was built on the plaintiffs' land but says the 1st defendant disputes its liability in trespass as the plaintiffs must have known about the building of the concrete slab on their land and so, acquiesced to it. Further the 1st defendant says that it honestly believed that it had piled

and constructed the slab on its own land or on state land or even 'no-man's' land. The question whether or not the plaintiffs had knowledge that the concrete slab was being built on their land and had acquiesced to it, or whether the 1st defendant's honest belief in what it did can afford it a defence to an action in trespass give rise to serious questions of fact and law which are not suitable to be decided on affidavit evidence at this stage of the proceedings. They will have to be determined at the trial.

[45] With regard to the plaintiffs' claim in nuisance, two issues have arisen here. The first relates to the plaintiffs' complaint that waste water, slush and mud has been discharged onto their land from the housing project, causing flooding on their land. This is disputed by the 1st defendant.

[46] The other and more serious issue arises as a result of the 1st defendant having raised the level of the housing project's land to some 1.5 meters above the level of the plaintiffs' land along its south-eastern and south-western boundary, and constructing a retaining wall along those boundaries. As a result, the water that normally flows naturally down from the plaintiffs' land to the defendants' lands ie, Lots 99, 190 and 698 has become penned back on the plaintiffs' land, causing it to flood. A serious question of law has arisen as a result of what the 1st defendant has done. It is this: Does the owner of higher land have a right to send down, and is there a corresponding obligation on the owner of lower land to receive natural water, whether flowing in a defined channel or not, as an incident of property arising from the relative levels of their respective lands? I am informed by counsel for the defendants that there is no decided case in Malaysia on the point, although there are cases which have decided the rights between adjacent land owners in respect of water flowing in a defined stream or water course. (See *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysian Industries Sdn Bhd* [1984] 1 CLJ 291; [1984] 1 CLJ (Rep) 326; *Toyo Textiles Industries Sdn Bhd & Anor v. Lian Foong Housing Development Sdn Bhd* [1986] 1 MLJ 412; *Chan Jen Chiat v. Allied Granite Marble Industries Sdn Bhd* [1994] 3 MLJ 495). But there are decisions on the point in other commonwealth jurisdictions which reveal two lines of authority. On the one hand, there are cases like *John Young & Co. v. Bankier Distillery Co.* [1983] AC 169, *Bailey v. Vile & Anor* [1930] NZLR 829 (a New Zealand case), *Gibbons v. Lenfestry* 84 LJPC 158 (a *Isle of Gurnsey* case) and *Sheik Hussain Sahib v. Pachipulusu Subbayya* [1925] ILR 49 Mad 441 (an Indian case), which decide that an owner of

higher land does have such a right, while on the other hand cases such as *Scott Rural Municipality v. Edwards* [1934] 3 DLR 793 (a Canadian case), *Gartner v. Kidman* [1961-1962] 108 CLR (a Australian case) and *Home Brewery plc v. William Davis & Co. (Loughborough) Ltd* [1987] 1 All ER decide that the owner of the lower land has no obligation to receive such water and is entitled to pen it back to the higher land. All the above-mentioned cases were reviewed by the Singapore Court of Appeal in *Medway Investments Pte Ltd v. Trustees of the Estate of Cheong Eak Chong* [1997] 3 SLR 40. After fully considering the decision in each of these cases the Singapore Court of Appeal followed the position in India, New Zealand and the Isle of Gurnsey, and held that the rights and obligations of owners of neighbouring lands with different levels are determined by the natural incidents of their respective land, and that the right of the upper landowner to send down, and the corresponding obligation of the lower landowner to receive natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them.

[47] What the position of the law in Malaysia is on the point in issue is a matter than can only be decided at the trial of this action and not now at this interlocutory stage. Suffice it to say that at this stage of the proceedings it constitutes a *bona fide* issue that has arisen for decision between the parties.

[48] I now move on to the next stage of enquiry to consider where the balance of justice lies in this case.

The Balance Of Justice

[49] In making my assessment on this aspect of the case I have taken into consideration the following matter:

Did Plaintiffs Sleep On Their Rights?

[50] I do not find that the plaintiffs have slept on their rights or delayed in coming to court for the relief they seek as alleged by the 1st defendant. With regard to the allegation of trespass, according to the 1st defendant, it began piling works for the retaining wall in about mid July 2004. The evidence shows that immediately on observing the piling works going on on their land, the 1st plaintiff lodged a police report on 12 July 2004 about the

trespass. Thereafter he made enquiries from Mr. Yong Ah Mui a surveyor of the 1st defendant who also works at Lands & Surveys Department at Betong who assured him that the 1st defendant was not encroaching onto his land. The 1st plaintiff also went to check personally with the Lands & Surveys Department at Sri Aman but without obtaining much information. Finally the plaintiffs engaged a professional private surveyor to conduct a boundary survey of their land which confirmed the trespass.

[51] As far as the allegation of nuisance is concerned, the plaintiffs say that by June 2004 water and mud from the housing project began flowing onto their land. The 1st plaintiff immediately went to the Lands & Surveys Department, Sri Aman to complain about it but was told to direct his complaint to the Department of Environment, which he officially did by letter dated 28 June 2004, but only after going to the construction site to see the 3rd defendant on the matter. Following the plaintiffs' complaint to the Department of Environment, its officers did go to visit the site after which the plaintiffs say the Department informed them that the 1st defendant had been asked to construct a drain.

[52] I do not regard what the plaintiffs had done by way of self-help in trying to resolve their problems about the piling works and flooding of their land, as indicative of persons who have slept on their rights as alleged. On the contrary I regard the action taken by the 1st plaintiff as reasonable steps which any other similarly circumstanced landowner would take before rushing to court for relief. I accept the plaintiffs' explanation for coming to court as a last resort. Accordingly I find that there has been no delay on the part of the plaintiffs in seeking relief.

The Balance Of Hardship *Vis-à-vis* The Concrete Slab

[53] According to the 1st defendant if it were to be ordered to remove the concrete slab and piles, it would be put to the hardship and expense it earlier described which it says is out of all proportion to the benefit to be gained by the plaintiffs from such an exercise. I do not agree. The concrete slab and piles which by the 1st defendant's own admission now sits on the plaintiffs' land, constitutes a serious violation of the proprietary rights of the plaintiffs as landowners. It adversely affects the enjoyment of their land. It must not be overlooked that the plaintiffs use their land for agriculture purposes and the concrete slab and piles sits on a flat area of their land which would

otherwise be available to them for agriculture purposes. I do not think it sits well with a just result between now and the trial, that the 1st defendant, whose sole purpose in developing the housing project is to sell the houses and shophouses constructed thereon for sale to third parties to generate a profit for itself should be heard to say that the plaintiffs should be left to its remedy in damages at the trial, if trespass is established. Here, the trespass is not one of a temporary nature or of a limited duration. Here the trespass is a continuing one which has not abated. Accordingly damages would not be an adequate remedy to the plaintiffs, whereas it would be to the 1st defendant if the court were to find eventually that an injunction was wrongly granted. The plaintiffs have given an undertaking in damages but the 1st defendant doubts their ability to meet their undertaking as their land is charged to a financial institution. However cases such as *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 show that in cases where the injustice to the plaintiff is so manifest, the court may dispense with the usual undertaking in damages. I regard this as such a case and accordingly dispense with the plaintiffs' undertaking in damages.

[54] I also find totally unacceptable the 1st defendant's argument that if ordered to remove the concrete slab and piles, it could do damage to the plaintiffs' land, chain link fence and fish ponds. I am amazed that the 1st defendant has the temerity to raise such an argument. Be that as it may when the 1st defendant put the piles into the plaintiffs' land and built the concrete slab, it did so without disturbing the chain link fence or the fish ponds. I do not think the plaintiffs should be denied, nor the court be deterred from arriving at a just result by the 1st defendant's veiled threat to become destructive if ordered to carry out the works.

[55] With regard to the 1st defendant's submission that the court should not order the removal of the concrete slab and piles because there is a danger that to do so would cause the 1st defendant's retaining wall to become unstable leading to its collapse which in turn would lead to flooding of the plaintiffs' land, and eventually to the detached houses on the housing project also collapsing, I find this a self serving and perverse argument. Here, the 1st defendant who admits to having wrongly piled and built the concrete slab on the plaintiffs' land now turns around to say, in effect, that the court should sanction the continuance of an

acknowledged trespass and gross violation of the plaintiffs' proprietary rights, just to benefit the 1st defendant. I accordingly reject this argument.

[57] With regard to the 1st defendant's contention that if the court were to order the concrete slab to be removed, it would need to divert its manpower and resources to doing so, thereby leading to delay in the completion of the housing project which in turn would expose the 1st defendant to huge financial losses in terms of having to pay liquidated damages to the house purchasers for late completion, I find this a very poor reason for the refusal of relief to the plaintiffs. In the first place the argument of the 1st defendant shows that it places the making of a monetary profit for itself above all else, despite the fact that the trespass to the plaintiffs' land is serious and continuing. In the second place, if the 1st defendant is exposed to claims for liquidated damages, then it only has itself to blame for such exposure. In the third place the 1st defendant has not placed any material before the court to enable the court to exercise discretion in its favour on this point. It has not even said how many houses it has sold, when the date of completion is fixed for and what sums are payable for late completion.

[58] With regard to the 'public interest' argument relied on by the 1st defendant to oppose the grant of relief to the plaintiffs, I find this argument misconceived. There is absolutely no element of public interest involved in this case. Here the 1st defendant is not performing any public functions or duties in developing its own private lands into a housing project. Further, the purchasers of the houses in the housing project, whether they be civil servants or rich or poor persons only constitute a very small section of the general population of Sarawak. If the 1st defendant delays in the completion of their houses, they have recourse against the 1st defendant for liquidated damages. So when properly viewed, it is only the very narrow commercial interest of the 1st defendant that is affected by any order the court may make here, quite unlike the situation in the Tenaga Nasional Berhad case where, if Tenaga Nasional had been ordered to remove the pylons it had constructed on private lands and which pylons formed part of the National Grid for the conveyance of electricity, it would have occasioned a disruption of electricity supply in Peninsular Malaysia.

[58] With regard to the 1st defendant's submission that the plaintiffs had tried to mislead the court into granting an *ex parte* injunction, by exhibiting photographs showing iron bars protruding from the concrete slab which bars are no longer there now, I find nothing in the point taken because the plaintiffs' application was not heard *ex parte* – I directed that it be heard *inter partes* and therefore those photos did not lead the court into making any orders. Besides, the protruding iron bass was only one of several grounds which the plaintiffs rely on in seeking injunctive relief.

The 3rd And 4th Orders Of Injunction

[59] The 1st defendant denies that water and mud had flowed from the housing project onto the plaintiffs' land. Therefore, the 1st defendant says the 3rd and 4th orders sought by the plaintiffs should not be granted. I do not agree. In my view, despite the denials of the 1st defendant, the facts speak for themselves here. When this application was first heard, the 1st defendant had not yet completed the building of the retaining wall on its own land. And although the 1st defendant says that the drainage system for the rest of the housing project was completed, by its own admission its drainage system at those parts of the housing project that border the plaintiffs' land was still temporary drainage. Although the 1st defendant says its temporary drainage system was sufficient to channel or divert water away from the plaintiffs' land, the fact that mud and water accumulated in such large amounts on the plaintiffs' land shows that the temporary drainage was insufficient to prevent the flooding to the plaintiffs' land. Further, it is in evidence that after being served the cause papers in this application, the 1st defendant quickly took steps to drain away the flood waters, but even that was not enough. If as the 1st defendant maintains, its temporary drainage was sufficient to channel and divert waters away from the plaintiffs' land, why would it go to such lengths and expend money to dig a channel to drain away the flood waters from the plaintiffs' land? The posture taken by the parties towards each other in these proceedings shows that there is very little goodwill between them. If the water and mud on the plaintiffs' land did not come from the housing project, it is highly unlikely that the 1st defendant would spend a single cent to alleviate the hardship of the plaintiffs. The truth of the matter is revealed in the photos exhibited by the plaintiffs as well as the 1st defendant which show that the temporary culvert which was installed by the 1st defendant at boundary peg 357 is itself almost chocked and three-quarters

buried in mud (see TCH9 (B), (C), (D)), while water and mud is able to flow onto the plaintiffs' land at the uncompleted end of the 1st defendant's retaining wall. There are also many cracks and weep-holes in the retaining wall itself through which water gushes onto the plaintiffs' land. I agree with counsel for the plaintiffs that photographs LPK4, LPK5, LPK9, LPK18, LPK24 (A-J) bear testimony to these.

[60] With regard to the 1st defendant's allegation that the plaintiffs are using their land 'illegally' because they have 'developed' it by building a house cum warehouse on it without first obtaining a change of land use and approved subdivision plan, the plaintiffs deny the alleged illegality. Whether or not the plaintiffs have done what the 1st defendant alleges on their land or whether the 1st defendant has correctly interpreted s. 227 of the Code or whether the plaintiffs have breached any provisions of s. 230 of the Code are not matters which are suitable to be decided at this interlocutory stage. They give rise to issues which can only be decided at the trial. Further, even if it can be argued that the plaintiffs have breached some provisions of the Code, that cannot possibly be a justification for the 1st defendant to cause flooding to the plaintiffs' land.

[61] With regard to the 1st defendant's contention that the flooding on the plaintiffs' land is caused by the plaintiffs' own failure to provide a proper drainage system to cater for the water from their house cum warehouse to be trapped on their land, I do not agree with this submission. The evidence produced by the plaintiffs in the form of photographs (LPK21 (A-I)) show that the plaintiffs have built a drain around their house cum warehouse or whatever term may be used to describe it, to drain away water from the house into the JKR drain along Jalan Long Round Road. Accordingly it is not difficult to see that the bulk of the flood water and mud which the plaintiffs seek relief from through the 3rd and 4th orders came from the housing project. Of course rain water which has flowed naturally down the slope at the rear of the plaintiffs' land has now become trapped on the plaintiffs' land but that has resulted from the 1st defendant raising the level of its land and building its retaining wall, and not because of the plaintiff not having a proper drainage system as alleged.

[62] With regard to the 1st defendant's argument base on s. 54(g) of the Specific Relief Act, I see nothing in the point taken. I find it far fetched to suggest that if the plaintiffs succeed in proving at the trial what they now allege against the 1st defendant, such acts would not constitute a nuisance.

[63] With regard to the 1st defendant's complaint that if the injunctions sought by the plaintiffs are granted to them now it would amount to saying that the 1st defendant had committed nuisance without affording it a right to be heard in a fair and full trial on the matter, I see nothing in the point taken. No doubt, the effect of the court granting to the plaintiffs the injunctions they seek is that this would virtually give to them, at this stage of the proceeding, the relief they seek in the action, but this does not preclude the court from granting an order, provided the court is satisfied with 'the degree of probability with which it appears to be established that the plaintiffs will ultimately succeed at the hearing – the stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interest be protected by the immediate issue of an injunction' (per Eusoffe Abdoolcader J, in *Gibb & Co. v. Malaysian Building Society Bhd* [1982] CLJ 185; [1982] CLJ (Rep) 99 at p. 103).

[64] The plaintiffs say that the 3rd and 4th orders should be granted to them as the trapped flood waters have begun to stagnate and emit a foul smell. They also fear health problems will arise from the stagnating water. I fully agree with counsel for the plaintiffs that they have cause to be concerned with this unhealthy state of affairs. While it may be that the plaintiffs have no alternative but to bear with the economic hardship caused by their fishes escaping or their fruit trees and flowering plants dying until the trial of this action, it would not be right to expose their health to risk in the meantime.

The 5th Order

[65] This order has become of great importance to the parties because between the date when this application first came on for hearing and the conclusion of arguments, the 1st defendant has completed the construction of its retaining wall, with the result that the rear portions of the plaintiffs' land is now water-locked. All rain water flowing down the slopes at the rear of the plaintiffs'

land are penned back on the flat portions and so the flooding to the plaintiffs' land can only get worse, with their worry over stagnating water and health concerns exacerbating.

[66] In opposing the grant of the 5th order the 1st defendant has repeated its arguments about the plaintiffs' alleged 'illegal' use of their land in not having applied for variation of title conditions and subdivision etc. I have already dealt with this point and what I said about it earlier on will apply equally here as well.

[67] With regard to the alleged 'insuperable difficulty and hardship' which the 1st defendant says it would face if the court were to grant the 5th order, I do not agree with the argument. Of course the grant of such an order may necessitate the 1st defendant having to amend and re-apply for approval of its drainage/engineering plan but I do not see why that should prevent the grant of relief, after all the 1st defendant had no difficulty amending its plans when it wanted to put up its retaining wall. In my view the present hardship and difficulty being faced by the plaintiffs from water being trapped on their land far outweighs the difficulty of the 1st defendant having to amend its plans and re-submit them for approval.

[68] With regard to the 1st defendant's argument about the invert levels of the drains in the housing project being too high to now receive the water from the plaintiffs' land, or alternatively even if the invert level of the drains in the housing project were lowered to 10.88 – 10.94 meters that would still not allow water to flow to the JKR main drain a Long Round Road because the invert level of that JKR drain is 11.23 meters, I do not accept this argument. It will be recalled that the 3rd defendant, Tay Ah Tee had said on oath in para. 26 of his affidavit in reply affirmed on 11 February 2006 when denying that the 1st defendant had caused the flooding on the plaintiffs' land, that the 1st defendant had constructed a temporary culvert near boundary peg 357 which sits at a level of 10.28 meters which is lower than the lowest part of the plaintiffs' land. To my mind the 1st defendant having known all along that the invert level of the JKR drain at Long Round Road is 11.23 meters, it would not have constructed its temporary culvert near peg 357 at a level of 10.28 meters if the culvert was not capable of draining away water from that level to the JKR main drain. Since the 1st defendant was obviously able to do so before, I do not see why it cannot do so now. The

fact that the drainage works were of a temporary nature then should not make any difference to the question of invert levels which the 1st defendant is now trying to use as a reason to resist the 5th order, because the invert level to the JKR drain at Long Round Road when the 1st defendant's drainage system was temporary was also 11.23 meters.

[69] With regard to the 1st defendant's contention that the only resolution to the plaintiffs' problem is to raise or backfill the plaintiffs' land to at least 12.80 meters, the plaintiffs say this is not a viable option because raising the level of their land to the height suggested by the 1st defendant would cause greater flooding to land adjacent to them, that is, to Lot 703 which is presently also submerged in water. Given the above situation I agree with the plaintiffs that raising the level of their land is not practical.

[70] With regard to the plaintiffs' accusation that the 1st defendant had placed incorrect data in the topographical survey plan, LPK28, relating to the spot level of the plaintiffs' land so as to mislead the relevant authority into approving the 1st defendant's engineering/drainage plan, this is a matter which cannot be decided on disputed facts in the affidavits at this stage of the case. It must await trial.

[71] With regard to the 1st defendant's arguments based on ss. 35(4), (7) and (8) of the Code, ie, that this court has no power to make the 5th order sought because the court would be usurping the function and jurisdiction of the Superintendent of Lands and Surveys, Sri Aman if it did so, I find absolutely no merit in this argument. It is misconceived. The plaintiffs are not here trying to enforce any of the statutory rights mentioned in ss. 35(4). There is no 'existing party drain' between the plaintiffs' land and that of the 1st defendant over which a dispute has arisen between the parties. Here the plaintiffs have come to court to enforce their common law rights of drainage as an incident of property arising between owners of adjoining lands because of the relative levels of their respective lands. Accordingly I find the arguments based on ss. 35(4), (7) and (8) of the Code and the case relied on in support of it, irrelevant.

[72] In the result, weighing up all the matters before me, I am satisfied that the plaintiffs have an unusually strong case that the matters complained of are unlawful. I find that the justice of the case lies in favour of the grant of the injunctions sought. In my

view far greater harm would result from the withholding of injunctive relief than by its grant. I accordingly grant the plaintiffs' application with costs and make the following orders. I grant the plaintiffs' application for the 1st, 2nd, 3rd and 4th orders in the terms prayed for. In respect of the 5th injunction applied for I grant an order in the following terms:

[73] An order that the 1st defendant or its successor in title whether by themselves, their servants or agents or otherwise howsoever do forthwith and in any event within fourteen (14) days from the date of this order do all things that may be necessary including but not limited to lowering the invert levels of the drains in the housing project and making such amendments to the 1st defendant's engineering plans/drainage plans as may be necessary and applying for approval for the same to the relevant authorities so as to provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land into the housing project's drainage system through the same passage and or channel in Lot 698 as where the 1st defendant's temporary culvert was situated near boundary peg 357 or any other passage or channel that will achieve the purpose.